IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT SENECA	:	**CIVIL ACTION**
	:	
v.	:	
	:	
NEW HOPE BOROUGH and	:	
ROBERT GERENSER, individually	:	
and as Councilman of New Hope	:	
Borough	:	**No. 01-2307**

M E M O R A N D U M

WALDMAN, J. **February 27, 2002**

Introduction

This case arises from the anonymous dissemination of a police accident report of a motor vehicle accident in which plaintiff was involved. Plaintiff alleges that defendant Gerenser, a New Hope Borough councilman, is the person who disseminated the report. He allegedly did so in retaliation for statements plaintiff made at a Borough council meeting and to deter him from speaking out further in support of a police chief who Mr. Gerenser opposed. Plaintiff alleges that Mr. Gerenser's fellow council members failed to prevent his dissemination of the report after plaintiff complained to them in a letter from his attorney.

Plaintiff has asserted a defamation claim and claims pursuant to 42 U.S.C. § 1983 for an array of constitutional violations by Mr. Gerenser for which plaintiff also seeks to hold the Borough liable. Plaintiff has also filed as discrete claims

a prayer for attorney fees pursuant to 42 U.S.C. § 1988 and 42 Pa. C.S.A. § 2503.[1]

Presently before the court is defendants' motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). Defendant Gerenser also asserts in the alternative that he is entitled to qualified immunity on the § 1983 claims and both defendants assert entitlement to official immunity on the defamation claim.

Legal Standard

Dismissal for failure to state a claim is appropriate when it clearly appears that plaintiff can prove no set of facts in support of the claim which would entitle him to relief. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Robb v. City of Philadelphia, 733 F.2d 286, 290 (3d Cir. 1984). Such a motion tests the legal sufficiency of a claim while accepting the veracity of the claimant's allegations. See Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990); Sturm v. Clark, 835 F.2d 1009, 1011 (3d Cir. 1987); Winterberg v. CNA Ins. Co., 868 F. Supp. 713, 718 (E.D. Pa. 1994), aff'd, 72 F.3d 318 (3d Cir. 1995). A court may also consider any document appended to and referenced in the complaint on which plaintiff's claim is

[1] Section 2503 provides for a recovery of counsel fees as part of the taxable costs in certain specified circumstances, none of which appear to be implicated in the instant case. Section 2503 also is a state procedural provision which is inapplicable to federal court litigation predicated on federal question jurisdiction. See Reitz v. Dieter, 840 F. Supp. 353, 355 (E.D. Pa. 1993).

predicated. See Fed. R. Civ. P. 10(c); In re Burlington Coat Factory Securities Litigation, 114 F.3d 1426 (3d Cir. 1997); In re Westinghouse Securities Litigation, 90 F.3d 696, 707 (3d Cir. 1996).[2] A court, however, need not credit conclusory allegations or legal conclusions in deciding a motion to dismiss. See General Motors Corp. v. New A.C. Chevrolet, Inc., 263 F.3d 296, 333 (3d Cir. 2001); Morse v. Lower Merion School Dist., 132 F.3d 902, 906 (3d Cir. 1997); L.S.T., Inc. v. Crow, 49 F.3d 679, 683-84 (11th Cir. 1995). A claim may be dismissed when the facts alleged and the reasonable inferences therefrom are legally insufficient to support the relief sought. See Pennsylvania ex rel. Zimmerman v. PepsiCo., Inc., 836 F.2d 173, 179 (3d Cir. 1988).

Factual Background

The pertinent facts as alleged by plaintiff are as follow.

Plaintiff is a shopkeeper and resident of New Hope, Pennsylvania. Defendant Gerenser is an elected councilman of the Borough of New Hope.

At various Borough council meetings the issue of the then police chief's continued service was discussed. Borough

[2] Plaintiff appended to and referenced in his complaint copies of the accident report at issue and a letter from his attorney to the defendant Borough on which his attempt to hold it liable rests. Defendants have not questioned the authenticity of these documents.

citizens as well as council members were "split" on the question of retaining the police chief. Plaintiff attended numerous council meetings where he expressed support for the police chief. Plaintiff and Mr. Gerenser "were on opposing sides of the issue of the police chief." As a result of this difference of opinion, Mr. Gerenser set out to punish plaintiff and deter him from speaking in support of the police chief at future meetings.

Mr. "Gerenser utilized his position and authority as a governmental official" to obtain from the state Bureau of Motor Vehicles a copy of a state police report of an accident in which plaintiff was involved while driving on Route 95 in Lower Makefield and then anonymously mailed copies to plaintiff's neighbors, business associates, friends and members of the New Hope Borough council.[3]

The report contains plaintiff's version of the accident which is that while exiting the highway, he lost control of his vehicle after braking on a slippery area, the vehicle then spun and overturned on its roof against an embankment. The report also relates that plaintiff was taken from the scene of the accident to a state police facility in Trevose so that a blood alcohol content percentage could be obtained. There is a

[3] Although the mailing was anonymous and Mr. Gerenser has not acknowledged responsibility for it, the court assumes to be true plaintiff's allegation that he was for purposes of the instant motion.

notation that a test was administered but the section in which the percentage result is to be recorded is blank. In a section captioned "Violations Indicated," the investigating officer noted "DUI, driving vehicle at a safe [sic] speed, careless driving." The letters DUI are handwritten in the upper margin of the report.[4] There is no statement in the report that any citation was actually issued or that any charge was ever lodged.

Plaintiff's attorney sent a letter to "New Hope Borough" informing the "Ladies/Gentlemen" to whom it was directed that "one of its Councilmembers" had improperly obtained and disseminated a copy of a police report of an accident in which plaintiff was involved in "violation of his constitutionally protected rights." Plaintiff's attorney further wrote that "I suggest the [Borough] Council immediately make provisions to have this matter resolved forthwith" and asked that the Borough "make appropriate reparations." At least one anonymous mailing of the accident report was made after plaintiff's attorney's letter to the Borough.

Discussion

A. Municipality Liability

A municipality is liable for a constitutional tort only" when execution of a government's policy or custom, whether made

[4] There is no allegation regarding who wrote the letters and it is otherwise unclear whether plaintiff contends it was the investigating officer or defendant Gerenser.

by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury" complained of. Monell v. Dept. of Social Services, 436 U.S. 658, 694 (1978).

"Policy" is made when a decision-maker with final authority to establish municipal policy with respect to the action in question issues an official proclamation, policy or edict. A "custom" is a course of conduct which, although not formally authorized by law, reflects practices of state officials that are so permanent and well settled as to virtually constitute law. A decision by an official with final discretionary decision-making authority, or ratification by such an official of the acts of a subordinate, can constitute a "policy." See City of St. Louis v. Praprotnik, 485 U.S. 112, 127 (1988); Pembauer v. City of Cincinnati, 475 U.S. 469, 480 (1986); Keenan v. City of Philadelphia, 983 F.2d 459, 468 (3d Cir. 1992); Omnipoint Communications, Inc. v. Penn Forest Twp., 1999 WL 181954, *10 n.4 (M.D. Pa. Mar. 31, 1999); Callahan v. Lancaster-Lebanon Intermediate Unit 13, 880 F.2d 319, 341 (E.D. Pa. 1994).

A municipality may also be liable under § 1983 for a failure properly to train, supervise or discipline employees when such failure amounts to deliberate indifference to the constitutional rights of persons with whom its employees come into contact. See City of Canton v. Harris, 489 U.S. 378, 388

(1989); Carter v. City of Philadelphia, 181 F.3d 339, 357 (3d Cir. 1999).

Plaintiff asserts only that after his attorney sent the letter addressed to "New Hope Borough," the Borough failed to stop a subsequent mailing of the accident report and thereby "participated in the behavior; adopted the behavior and made it part of the Borough's policy." There is no suggestion that any council member or Borough official other than Mr. Gerenser obtained or disseminated the accident report for any reason. Plaintiff acknowledges in his complaint that the council was split regarding support for the police chief and that council members were themselves targeted for the anonymous mailing.

A decision of a duly constituted legislative body is an act of official policy. See City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 259-52 (1981). The actions of a single council member, however, do not establish official policy or bind the municipality. See Church v. City of Huntsville, 30 F.3d 1332, 1343 (11th Cir. 1994). Approval of the conduct of a councilman cannot be inferred from the mere silence of other council members. See id. at 1344 n.5.

Municipal liability cannot be predicated on the failure of the Borough to prevent the dissemination of the accident report upon receipt of plaintiff's lawyer's letter. The only action requested of the Borough in plaintiff's lawyer's letter

was a prompt resolution of the matter by the payment of reparations. The council member allegedly responsible for the dissemination of the accident report is not named or otherwise identified in the letter. The activity alleged in the letter is in the past tense. There is no suggestion of ongoing activity. The inaction of the Borough in response to such a letter does not demonstrate a policy of deliberate indifference.

Most importantly, a council member is not a subordinate employee of the council or Borough. Plaintiff alleges no facts and cites no law to show that any executive or legislative official of the Borough has the authority to supervise, discipline or constrain the conduct of an elected Borough council member.

If there are additional facts which plaintiff can allege in good faith to sustain a municipal liability claim, he has neither pled them nor suggested any in response to the motion. The claims against the Borough will be dismissed.

B. Plaintiff's § 1983 Claims Against Defendant Gerenser

A plaintiff may recover damages under § 1983 for injuries caused by the deprivation of his constitutional rights by persons acting under color of state law. See Farrar v. Hobby, 506 U.S. 103, 112 (1992); Squires v. Bonser, 54 F.3d 168, 172 (3d Cir. 1995).

In Count I of plaintiff's complaint, he asserts that defendants' dissemination of the accident report violated plaintiff's First Amendment right of speech. The constraints of the First Amendment are applicable to the states through the Fourteenth Amendment. See Brandenburg v. Ohio, 395 U.S. 44, 449 (1969). Governmental action against an individual in retaliation for, or to deter, his exercise of First Amendment rights is actionable under § 1983. See Allah v. Seiverling, 229 F.3d 220, 225 (3d Cir. 2000); Anderson v. Davila, 125 F.3d 148, 160 (3d Cir. 1997); Estate of Smith v. Maroseo, 2002 WL 54507, *26 (E.D. Pa. Jan. 11, 2002); Zapach v. Dismuke, 134 F. Supp. 2d 682, 687 (E.D. Pa. 2001).

Plaintiff's comments at public council meetings regarding whether the police chief was properly performing his official responsibilities is core speech protected by the First Amendment. See Czurlanis v. Albanese, 721 F.2d 98, 104 (3d Cir. 1983). Plaintiff alleges that the motivating factors for the dissemination of the embarrassing accident report by Mr. Gerenser were retaliation for plaintiff's public expression of support for the police chief and deterrence of any further such expression.[5]

[5] The court accepts these allegations as true in deciding the instant motion to dismiss. The court at this juncture does not decide whether the dissemination by an official of negative information about a speaker not to punish or deter his speech, but only to attempt to discredit him and dissuade others from being influenced by him, would violate the First Amendment.

Defendant has suggested no justification for the challenged action and in any event none appears from the complaint itself.

To satisfy the color of law requirement, a plaintiff must show that in committing the act complained of, the defendant abused power possessed by virtue of state law and made possible only because he has been clothed with the authority of the state. See Bonenberger v. Plymouth Township, 132 F.3d 20, 24 (3d Cir. 1997); Groman v. Township of Manalapan, 47 F.3d 628, 633 (3d Cir. 1995). Plaintiff has adequately alleged that defendant Gerenser acted in such a capacity when he requested and obtained the accident report. Officials of political subdivisions of the Commonwealth are among those who have a right to obtain a police report of a vehicle accident. See 75 Pa. C.S.A. § 3751(b). For purposes of the First Amendment claim, however, it is the dissemination of the report which appears to be pertinent. Whether Mr. Gerenser was acting under color of law in anonymously mailing copies of the report may be a closer question. Defendant, however, has not raised this as a basis for dismissal and it is not clear from the face of the complaint that plaintiff will be unable to present evidence to satisfy this element.

In Count II of plaintiff's complaint, he asserts that his First and Fourteenth Amendment rights were violated by disclosure of the accident report with "inten[t] to defame the

plaintiff and deprive him of his property interest in his good name without benefit of due process."

There is no constitutionally secured liberty or property interest in one's reputation. Unless accompanied by an alteration in legal status or extinction of an otherwise legally protected right, reputational injury inflicted by the State is not actionable under § 1983. See Siegert v. Gilley, 500 U.S. 226, 233 (1991); Paul v. Davis, 424 U.S. 693, 712 (1976); Clark v. Township of Falls, 890 F.2d 611, 619 (3d Cir. 1989); DeFeo v. Sill, 810 F. Supp. 648, 656 (E.D. Pa. 1993); Balliet v. Whitmore, 626 F. Supp. 219, 224-25 (M.D. Pa.), aff'd, 800 F.2d 1130 (3d Cir. 1986).

Plaintiff's allegation that dissemination of the accident report has had a "deleterious effect" on his "business career and personal reputation" does not remotely satisfy the "stigma plus" test of Paul. See Neu v. Corcoran, 869 F.2d 662, 669 (2d Cir. 1989) (defamatory statements resulting in inability to engage in chosen business insufficient); Sturm v. Clark, 835 F.2d 1009, 1013 (3d Cir. 1987) (defamatory statement resulting in loss of business and income insufficient); Mosrie v. Barry, 718 F.2d 1151, 1158 (D.C. Cir. 1983) (economic injury to business insufficient); Havas v. Thornton, 609 F.2d 372, 375 (9th Cir. 1979) (statements impugning business practices in conspiracy to drive plaintiff out of business insufficient); Dower v.

Dickinson, 700 F. Supp. 640, 647 (N.D.N.Y. 1988) (defamatory statements by township supervisor impairing plaintiff's business opportunities insufficient). Even the "serious impairment" of employment prospects or business opportunities resulting from an injury to reputation does not elevate a tortious injury to constitutional dimensions. Siegert, 500 U.S. at 234. See also Puricelli v. Borough of Morrisville, 820 F. Supp. 908, 915 (E.D. Pa. 1993), aff'd, 26 F.3d 123 (3d Cir.), cert. denied, 513 U.S. 930 (1994); DeFeo, 810 F. Supp. at 656.

Plaintiff does not explain his reliance on the First Amendment. While the First Amendment may not protect defamatory speech, it does not provide a right actionable under § 1983 not to be defamed. This claim will be dismissed.

In Count III, plaintiff asserts that defendant searched through and seized the accident report in violation of plaintiff's Fourth and Fourteenth Amendment rights.

The Fourth Amendment is made applicable to state actors by the Fourteenth Amendment. See Ker v. California, 374 U.S. 23, 30 (1963). The Fourth Amendment protects the security of individuals "in their persons, houses, papers, and effects against unreasonable searches and seizures." [emphasis added]

To claim the protection of the Fourth Amendment right against unreasonable searches, the claimant must have "a legitimate expectation of privacy in the invaded place." Rakas

v. Illinois, 439 U.S. 128, 143 (1978). A seizure occurs when there is a meaningful interference with a person's possessory interest in the affected property. See Brown v. Muhlenberg Twp., 269 F.3d 205, 209 (3d Cir. 2001).

The accident report was the product of a state police officer. It is the property of the Bureau of Motor Vehicles which also has custody and control of it. Plaintiff has no legitimate expectation of privacy in the premises of the Bureau and no possessory interest in the report. The report was not a paper or effect of his. See Rakas, 434 U.S. at 148-49 (no Fourth Amendment claim where claimant lacks legitimate privacy expectation in place searched and had no property or possessory interest in items seized).

This claim will be dismissed.

In Count IV of plaintiff's complaint, he asserts that his Fifth and Fourteenth Amendment rights were violated when the accident report was used to "effectuate a defacto conviction and public persecution of plaintiff" and "caused plaintiff to be held to answer for an infamous crime without appropriate charges by appropriate officials." Plaintiff also asserts that the disclosure "denied plaintiff his liberty interests and the privacy of his confidential records without due process."

The Fifth Amendment, of course, applies only to actions of the federal government. See Bartkus v. Illinois, 359 U.S. 121

(1959); Brock v. North Carolina, 344 U.S. 424 (1953); Moyer v. Borough of North Wales, 2000 WL 1665132, *2 (E.D. Pa. Nov. 7, 2000); Huffaker v. Bucks County Dist. Attorney's Office, 758 F. Supp. 287, 290 (E.D. Pa. 1991). Plaintiff explains in his brief that he is relying on "the privilege against self-incrimination" and this "portion of the Fifth Amendment applies to state actors as well as federal actors." No portion of the Fifth Amendment applies to state officials.

Moreover, plaintiff has not identified any answer to a question he was compelled to give by defendant, let alone one which may be used to incriminate him in a criminal proceeding. Any statement provided by plaintiff was made weeks earlier to the state police. Plaintiff cites no authority for the remarkable proposition that the subsequent disclosure in a non-judicial and non-investigatory context by a third party of a statement already given to law enforcement officials by an individual violates his right against self-incrimination. Plaintiff's claim that disclosure of the accident report caused plaintiff improperly "to be held to answer for an infamous crime" and resulted in a "de facto conviction" also is frivolous.

Although not pellucid, it appears from the melange which constitutes Count IV that plaintiff therein may also be endeavoring to assert a Fourteenth Amendment privacy clam.

That an individual does not have a protectible Fourth Amendment interest in a record does not foreclose the possibility that he has a privacy interest in the content of the record. See Young v. U.S. Dept. of Justice, 882 F.2d 633, 642 n.11 (2d Cir. 1989). There is a recognized right of personal privacy which encompasses an individual's interest in avoiding disclosure of personal matters. See Whalen v. Roe, 429 U.S. 589, 599-600 (1977). This right may be violated when the private affairs of an individual are made public by government officials absent a sufficient countervailing need or justification. See U.S. v. Westinghouse Elec. Corp., 638 F.2d 570, 577-78 (3d Cir. 1980). That personal information may have been properly obtained by government officials in the first instance does not foreclose protection from a subsequent unauthorized disclosure of such information. See Hunter v. S.E.C., 879 F. Supp. 494, 498 (E.D. Pa. 1995).

Protection is afforded, however, only to information in which a party has a reasonable expectation of privacy. See Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia, 812 F.2d 105, 112 (3d Cir. 1987). Such protection has generally been accorded to personal finances, juvenile records, data reflecting mental or physical health and similar intimate information. Such an expectation may arise from custom, privileges, laws or regulations proscribing or circumscribing

disclosure of particular personal information which reflect a societal judgment that these matters should be accorded confidentiality. See Hunter, 879 F. Supp. at 479.

Information about the occurrence and possible causes of a vehicular accident on a public highway is not the type of information about the affairs of those involved to which society would ordinarily be expected to accord confidentiality. Copies of police accident reports are available to a wide array of people, including officials of political subdivisions. See 75 Pa. C.S.A. § 3751(b). This provision signals the "widespread potential distribution of the report." Commonwealth v. Barger, 375 A.2d 756, 764 (Pa. Super. 1977). See also Derabasse v. Bedford Borough, 18 Pa. D. & C.3d 216, 220 (C.P. Bedford Cty. 1981)(noting that in view of § 3751(b) "it must be recognized that copies of the report easily could be obtained by others").

There is no limitation in § 3751 regarding the need or purpose of the requestor. There are limitations, however, on the republication of reports relating to an individual's driving record. See 75 Pa. C.S.A. § 6114(a). An unauthorized publication is punishable by a fine of $100.[6] The question, however, is not whether Mr. Gerenser may be liable for a $100 fine, but whether plaintiff had a reasonable expectation that an

[6] It appears from a reading of § 6114 that the primary thrust of the provision is to deter commercial exploitation of this information.

accident report prepared by a police officer would receive confidential handling. An individual cannot reasonably expect that a police report of a vehicular accident in which he is involved will receive meaningful confidentiality given the clear potential for widespread distribution and the nominal penalty for unauthorized publication.[7] The court certainly does not condone any unauthorized disclosure of a vehicular accident report, but every clerk at the Bureau of Motor Vehicles who may have done so has not violated the federal constitution.

In Count V, plaintiff asserts that he "has not and will not be able to obtain a true and meaningful name clearing hearing in violation of the due process clauses of the Fifth and Fourteenth Amendments."

Plaintiff's reliance on Loudermill v. Cleveland Board of Education, 470 U.S. 532 (1985) is completely misplaced. That case involves procedures for the termination of a protected right to public employment. Due process requires that a public employer provide an opportunity for a "name clearing" hearing to a public employee who has been defamed in the course of a termination. See Codd v. Velger, 429 U.S. 624, 627 (1978); Board

[7] Compare 18 U.S.C. § 1905 (providing for one-year imprisonment and removal from office for unauthorized disclosure of investigative records or reports); 5 U.S.C. § 552a(i) (providing for $5,000 fine for willful disclosure of protected record).

of Regents of State Colleges v. Roth, 408 U.S. 564, 573 n.12 (1972); Brennan v. Hendrigan, 888 F.2d 189, 196 (1st Cir. 1989). Plaintiff was not defamed in the course of a termination of public employment, or in conjunction with the extinction of any other legally protected right.

Moreover, even a discharged public employee must allege that he timely requested a hearing to clear his name and that this request was denied. See Howze v. City of Austin, 917 F.2d 208 (5th Cir. 1990) (reversing verdict for public employee on § 1983 claim where plaintiff presented insufficient evidence that name clearing hearing had been requested). There is no allegation that plaintiff timely requested a hearing from anyone to clear his name.

In Count VI of his complaint, plaintiff asserts that the anonymous mailing deprived him of his Sixth Amendment right "to a trial by an impartial jury and to be informed of the nature and cause of the accusation against him and to be confronted with the witnesses against him."

The Sixth Amendment is applicable to the states through the Fourteenth Amendment. See Lilly v. Virginia, 527 U.S. 116, 123 (1999). The Sixth Amendment on its face, however, applies to "criminal prosecutions" or adversarial proceedings initiated against a criminal defendant. Plaintiff's Sixth Amendment claim is frivolous.

C. Plaintiff's State Law Defamation Claim

In Count VIII, plaintiff asserts a state law claim for defamation. To sustain a defamation claim, a plaintiff must show: the defamatory character of the communication by the defendant; defendant's publication of the communication; that it applied to plaintiff; that recipients understood the defamatory meaning; that the understanding was as it was intended to be with respect to the plaintiff; special harm to plaintiff from its publication; and, where applicable, abuse of a conditionally privileged occasion. See 42 Pa. C.S.A. § 8343.

A defamatory statement is one that "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia, 898 F.2d 914, 923 (3d Cir.) (citation and internal quotations omitted), cert. denied, 498 U.S. 816 (1990). "A communication is defamatory if it ascribes to another conduct, character or a condition that would adversely affect his fitness for the proper conduct of his proper business, trade or profession." Maier v. Maretti, 671 A.2d 701, 704 (Pa. Super. 1995), appeal denied, 694 A.2d 622 (Pa. 1997). The court must initially examine an allegedly defamatory statement in context and determine if it is capable of defamatory meaning. Id.

Defendants claim immunity pursuant to the Pennsylvania Political Subdivision Tort Claims Act, 42 Pa. C.S.A. § 8541 et seq. ("Tort Claims Act"). In a single sentence, defendants also argue that "plaintiff has failed to state a cause of action for defamation as it pertains to elements 5 and 6" as listed in § 8343.

1. New Hope Borough

Section 8541 of the Tort Claims Act provides that:

> "[e]xcept as otherwise provided in this subchapter, no local agency shall be liable for any damages on account of any injury to a person or property caused by any act of the local agency or an employee thereof or any other person."

A plaintiff may only recover from a local agency or municipality if damages would otherwise be recoverable under common law or statute, the injury was caused by the negligent act of the local agency or an employee acting within the scope of his official duties and the negligent act falls within one of the eight enumerated categories. See Ballas v. City of Reading, 2001 WL 73737, *10 (E.D. Pa. Jan. 25, 2001); Swartz v. Hilltown Township Volunteer Fire Co., 721 A.2d 819, 820-21 (Pa. Commw. 1998).

Plaintiff contends that the Borough is not immune from liability because Mr. Gerenser's conduct falls within the exception regarding the care, custody or control of personal

property. See 42 Pa. C.S.A. § 8545(b)(2) (exception to governmental immunity is the care, custody or control of personal property of others in the possession or control of the local agency).

This exception specifically provides that "[t]he only losses for which damages shall be recoverable under this paragraph are those property losses suffered with respect to the personal property in the possession of the local agency." Plaintiff makes no allegation of any loss of personal property in the possession of the Borough or otherwise. This exception does not apply. See, e.g., McMillian v. Philadelphia Newspapers, Inc., 2001 WL 267867, *8 (E.D. Pa. Mar. 15, 2001). New Hope Borough is immune from liability on plaintiff's defamation claim.

2. Defendant Gerenser

Mr. Gerenser relies on § 8546 of the Tort Claims Act which provides the defense of official immunity. Section 8550, however, provides:

> In any action against a local agency or employee thereof for damages on account of an injury caused by the act of the employee in which it is judicially determined that the act of the employee caused the injury and that such act constituted a crime, actual fraud, actual malice or willful misconduct, the provisions of sections 8545 (relating to official liability generally), 8546 (relating to defense of official immunity), 8548 (relating to indemnity) and 8549 (relating to limitation on damages) shall not apply.

Willful misconduct means that the actor desired to bring about the result that followed or acted with an awareness that it was substantially certain to ensue. See Schieber v. City of Philadelphia, 156 F. Supp. 2d 451, 466 (E.D. Pa. 2001). Plaintiff sufficiently alleges that Mr. Gerenser's conduct was willful and it may reasonably be inferred that he would be aware that plaintiff's reputation would be damaged by the suggestion he was driving under the influence of alcohol.[8]

Pennsylvania common law recognizes the doctrine of absolute immunity for high public officials and Mr. Gerenser correctly notes that the Pennsylvania Supreme Court has held that § 8550 does not abrogate this doctrine. See Lindner v. Mollan, 677 A.2d 1194, 1196 (Pa. 1996). However, "[i]n Lindner, the court held that high public official immunity is an unlimited privilege that exempts high public officials from defamation lawsuits, provided that the statements made by the official are made in the course of his official duties and within the scope of his authority." Lamb Foundation v. North Wales Borough, 2001 WL 1468401, *10 (E.D. Pa. Nov. 16, 2001) (emphasis added).

---

[8] Negligent acts for which a local agency may be held responsible do not include acts by an employee that constitute a crime, actual fraud, actual malice or willful misconduct. Only the offending employees themselves may be held liable for such conduct. See Ballas, 2001 WL 73737 at *10; McMillan, 2001 WL 267867 at *7; Dubosh v. City of Allentown, 629 F. Supp. 849, 856 (E.D. Pa. 1985) (§ 8550 does not waive governmental immunity of municipal entity itself).

Whether a particular public official is a "high public official" depends on "the nature of his duties, the importance of his office, and particularly whether or not he has policy-making functions." Id. at *11 (quoting Montgomery v. City of Philadelphia, 140 A.2d 100, 105 (Pa. 1958)).[9] Assuming arguendo that Mr. Gerenser is a high public official, it is not clear from the face of the complaint that the anonymous mailing was in the course of his official duties and within the scope of his authority.

Element five requires proof of "the understanding by the recipient of [the publication] as intended to be applied to the plaintiff." Clearly, the content of the mailing could only be understood by recipients as applying to plaintiff. Element six requires proof of "special harm" resulting to plaintiff from publication. Special damages are "actual and concrete damages capable of being estimated in money." Clemente v. Espinosa, 749 F. Supp. 672, 677 (E.D. Pa. 1990). Plaintiff adequately alleges

[9] In two instances, courts in this district have held that a particular councilman was entitled to absolute immunity as a high public official. See, e.g., Kelleher v. City of Reading, 2001 WL 1132401, *4 (E.D. Pa. Sept. 24, 2001); Satterfield v. Borough of Schuylkill Haven, 12 F. Supp. 2d 423, 442 (E.D. Pa. 1998).

that the mailing had a "deleterious effect" on his "business career."[10]

Plaintiff has sufficiently pled a claim for defamation against defendant Gerenser.

CONCLUSION

Plaintiff has alleged facts sufficient to maintain a § 1983 First Amendment and state law defamation claim against defendant Gerenser.[11] Should plaintiff ultimately prevail on his § 1983 claim, he may be entitled to recover legal fees as part of his relief pursuant to § 1988. Plaintiff has otherwise failed to present cognizable claims.

Accordingly, with the exception of these claims, defendants' motion will be granted. An appropriate order will be entered.

---

[10] Also, words that impute criminal conduct are slanderous per se and actionable without proof of special damages. See Clemente, 749 F. Supp. at 677. The suggestion that plaintiff was driving while intoxicated, if untrue, may be actionable even in the absence of special damages.

[11] Contrary to his suggestion, Mr. Gerenser is not entitled to qualified immunity on the federal claim as pled. A reasonable official would have known that retaliation against an individual for speaking on a matter of public concern, or an effort to intimidate someone from so speaking, would violate a well-established constitutional right of speech.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT SENECA	**:**	**CIVIL ACTION**
	:	
v.	**:**	
	:	
NEW HOPE BOROUGH and	**:**	
ROBERT GERENSER, individually	**:**	
and as Councilman of New Hope	**:**	
Borough	**:**	**No. 01-2307**

O R D E R

AND NOW, this day of February, 2002, upon consideration of defendants' Motion to Dismiss (Doc. #5) and plaintiff's response thereto, consistent with the accompanying memorandum, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** as to all claims against New Hope Borough which is dismissed as a party defendant herein and as to all claims against defendant Gerenser except the 42 U.S.C. § 1983 First Amendment claim in Count I, the state law defamation claim in Count VIII and plaintiff's prayer for attorney fees.

BY THE COURT:

_____

JAY C. WALDMAN, J.